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No. 586

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

ARTHUR STETER,

Petitioner,

v.

NEW YORK STATE EDUCATION COMMISSIONER, NEW YORK CITY BOARD OF HIGHER EDUCATION, and BROOKLYN COLLEGE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT COMMISSIONER OF EDUCATION IN OPPOSITION

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January 12, 1960.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Text of Pertinent Statutes and By-Laws

28 U. S. C. 1343 (3)

"§ 1343. Civil Rights.

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . . . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

§ 310 New York State Education Law.

"§ 310. Appeals or petitions to commissioner of education and other proceedings.

"Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any action:

"1. By any school district meeting.

"2. By any district superintendent and other officers, in forming or altering or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.

"3. By a county treasurer or other distributing agent in refusing to pay any such moneys to any such district.

"4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act.

"5. By any trustees of any school library concerning such library, or the books therein, or the use of such books.

"6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district.

"7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools."

§ 6202

Article 125, New York State Education Law.

"§ 6202. Powers and duties.

"Such board of higher education shall be a separate and distinct body corporate, shall have the duties and powers of trustees of colleges as set forth in this chapter, unless otherwise specifically provided in this article, and the institutions and educational units which such board shall conduct shall be part of the common school system and shall have the powers and privileges of colleges and shall be subject to the visitation of the regents of the university. The control of the educational work of such institutions shall rest solely in the board of higher education which shall administer all educational units controlled by it, as and under the general name and title of the college of the city of New York; but each unit of such college shall be given an appropriate and distinctive designation, and any existing unit, constituting a college for women, shall retain its present, distinctive name.

. . . .

"The board shall establish positions, departments, divisions and faculties; appoint and in accordance with

the provisions of law fix salaries of teachers and other employees therein; establish and conduct courses and curricula and prescribe conditions of student admission, attendance and discharge. The board shall furnish the benefits of collegiate education gratuitously to citizens who are actual residents of the city, except as otherwise provided in this section and in sections sixty-two hundred three and sixty-two hundred four of this chapter, and who are qualified for admission to any regular undergraduate course of study leading to a baccalaureate degree and to any course of study in any preparatory, training or model school connected with any institution under its control; and it may furnish gratuitously or otherwise for male and female students, actual residents (except as otherwise provided in section sixty-two hundred four) or employees of said city and non-matriculated students, additional technical, professional and special courses of study and other educational advantages. * * *"

By-Laws of the Board of Higher Education of the City of New York, Sections 18.4, 18.6 and 18.7.

"18.4 Student Discipline.

"a. Each student enrolled in any college or school under the control of the Board and every organization, association, publication, club or chapter shall obey all the rules and regulations and orders of the duly established college authorities, shall give punctual and courteous attention to all college duties, shall use the property of the institution with care and economy, shall conform to the requirements of good manners and good morals, and shall obey the laws of the City, State and Nation within college grounds and elsewhere.

"b. Each faculty shall have power to establish rules of conduct and regulations in greater detail than the general requirements set forth above and it shall have power to appoint a discipline committee to which it may, in its discretion, invite student cooperation or participation therein. This committee, if appointed, shall try cases of misconduct and recommend penalties."

"§ 18.6. Duties of Deans. A dean, in cases of violation of college regulations, breach of the peace, or damage to property by a student or student organization may reprimand such student or student organization verbally or by publication, suspend for a period of time not exceeding one term or deprive of specific college privileges and advantages. He may also recommend the dismissal of a student from college but that penalty may be imposed only by the president or pursuant to a majority vote of the appropriate school faculty or faculty council concerned."

"§ 18.7 Appeals. Appeals from the decision of a disciplinary committee or a dean may be made to the president. His decision shall be final except in case of dismissal. Appeal from the decision of dismissal for any cause may be made to the Board."

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BRIEF FOR RESPONDENT COMMISSIONER OF EDUCATION IN OPPOSITION

Opinions Below

The opinion of the District Court (App. D, p. 20 of Petition) is reported at 161 F. Supp. 549. The opinions of the United States Court of Appeals for the Second Circuit (App. A, p. 1 and App. B, p. 10 of Petition) and the dissenting opinion thereof (App. C, p. 16 of Petition) are reported at 271 F. 2d 13.

Jurisdiction

The petitioner seeks to invoke the jurisdiction of this Court under 28 U. S. C. 1254 (1), but respondent herein submits that the Federal District Court and the Court of Appeals had no jurisdiction of the matter.

Question Presented

Contrary to the petitioner's allegation that six questions are here presented, as set forth in the petition herein, there are only two questions actually presented by this petition, *viz.*:

1. Was petitioner deprived by the State Authorities of his freedom of speech without due process of law?

2. Was petitioner deprived, by the State Authorities, of the equal protection of the law in contravention of the Fourteenth Amendment to the United States Constitution?

Statutes and By-Laws Involved

The pertinent statutes and by-laws involved in this matter are:

New York State Education Law, Section 310;
New York State Education Law, Article 125, Section 6202, in part;
By-laws of the Board of Higher Education of the City of New York, Sections 18.4, 18.6 and 18.7.*

Statement

The circumstances which have given rise to this petition encompass events which happened over a protracted period

* These by-laws were numbered Sections 214-a, 216 and 217, prior to April 1959.

beginning with petitioner's entrance as a student into Brooklyn College in 1952, said institution being a public college operated by the Board of Higher Education of the City of New York. He was later suspended twice and finally dismissed for disciplinary reasons. The many separate incidents involved in this matter and the administrative procedures followed by the respondents are set forth in detail in the record before the Court and in the opinions of the Judges of the Courts below; it is, hence, unnecessary to repeat them here.

The issue is essentially whether the public school authorities of a State can take due and proper disciplinary action against a student of a public college without a full trial. It is submitted that if the federal courts have jurisdiction over college disciplinary matters, there is no reason why their jurisdiction would not also extend to the elementary and high schools of the 50 States—all of which is clearly contrary to the Federal nature of our system of government.

Respondents fully realize that expulsion from a college is drastic action, but the record is clear that the action here taken was reasonable and fair and was taken only after long deliberation, painstaking efforts to avoid such action, if possible, and a strict adherence to the statutes and rules of procedure covering such action.

The matter basically has little to do with petitioner's rights under the Fourteenth Amendment to the United States Constitution or the Federal Civil Rights Act, 28 U. S. C. 1343 (3). Although petitioner has asserted that he, as a student, was not treated the same as an "ordinary citizen," there is nothing in the record to sustain this. He can still speak out, and he still enjoys the same civil rights as others but must use language which, though firm, must

reflect the respect due a college president and other authorities from a student who has agreed to abide by the regulations of the college. This is simply a case of a college student who, again and again, broke the rules of the college and, after repeated warnings and two suspensions, was expelled. Each one of us in this free society must live by the law and rules of good order—to do otherwise would not be freedom, but chaos.

The record shows that the public school authorities of the City of New York and of the State of New York took great pains to insure that petitioner was afforded equal protection of the laws and due process. He was at all times apprised of the charges against him, and he was granted ample opportunity to speak in his defense and to submit briefs and memoranda in his behalf.

Any other "ordinary citizen" *while a student at Brooklyn College* would have been treated in the same manner and would have been afforded the same rights of appeal to higher authority within the State in accordance with long-established rules of procedure. Petitioner was not discriminated against. It must be emphasized that contrary to an impression set forth in the dissenting opinion of Chief Judge Clark, he is not barred from seeking to complete his education at other public or private colleges and universities of the State of New York.

Argument

1. The United States District Court did not have jurisdiction of the cause at bar.

   a. Petitioner did not exhaust his atlministrative remedy in the State Courts.

   b. The civil rights statute is not broad enough to serve as basis for the jurisdiction of the Federal

Courts in matters such as the cause at bar, because under the established concept of the comparative functions of State and Federal Courts, the Federal Courts should not preempt matters reserved by their very nature to the State Courts except in most unusual cases. This case does not fall into this category.

2. The record does not show any facts which would support petitioner's claim as to deprivation, without due process of law, of his right to freedom of speech and deprivation of the equal protection of the law.

3. The questions here sought to be raised are plainly unsubstantial because they are foreclosed by previous decisions of this Court on the subject.

I.

The United States District Court did not have jurisdiction over the cause at bar.

It is well established that the providing of public education in this country is a responsibility left to the States. This is not to say, of course, that everybody and everything connected with education in the States can be, or should be, dealt with summarily without regard to personal safeguards afforded by the United States Constitution and the Federal Civil Rights Act. But neither should it be true that anybody can place himself under the jurisdiction of the Federal District Court and the Federal Court of Appeals merely by the bald assertion that his constitutional and civil rights have been violated.

Petitioner invoked the jurisdiction of the District Court under the provisions of subdivision 3 of 28 U. S. C. 1343, which section reads in pertinent part as follows:

"§ 1343. Civil Rights

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . . . .

"(3) To redress the deprivation, under color of any State Law, statute, ordinance, regulation, custom or usage, or any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

Can this statute protect a student in a public college from the consequences of writing letters in which he accuses his superiors of "vile indecencies", "malicious lies", etc.?

Respondents respectfully submit that the United States District Court for the Eastern District of New York did not have jurisdiction over the cause at bar.

1. Petitioner, in a field reserved to the States under the United States Constitution, had a choice of remedies. Under State Law, he could have proceeded to review the determination of the Board of Higher Education in the Supreme Court of the State of New York, under New York Civil Practice Act, Article 78. Instead, he elected to bring an appeal to the Commissioner of Education, under New York Education Law, Section 310. Upon an adverse decision, again, he could have sought a review of the Commissioner's decision, under Article 78 of the New York Civil Practice Act. While the language of said Section 310 makes such decisions "final and not subject to review in any court or place whatever", the New York Court of Appeals has held that such decisions are nevertheless reviewable if they are "purely arbitrary" (*Board of Education and*

Board of Higher Education v. *Allen*, 6 N. Y. 2d 127, May 1959).

Petitioner had a further choice of remedies, in that, instead of seeking a review of the action of the Board of Higher Education by the State Supreme Court, or the Commissioner of Education, he could have, *directly*, sought relief from the United States District Court. This he did not do, however. *Hence the question of direct and initial jurisdiction of the United States District Court in a matter such as this, is not here at issue.* Hence, petitioner is barred by the fact that he did not exhaust his remedies in the State Courts, and is barred by his election of remedies.

2. It is submitted, further, that the United States District Court has no jurisdiction in matters such as this, for another reason. In this respect, Judge Gibson's reference to Judge Wyzanski's opinion in *Cranney* v. *Trustees of Boston University*, 139 F. Supp. 130, is very much in point.

The existence of a federal or constitutional question is the subject of many judicial decisions covering a long period of time. It may be correct that all judicial precedents may not be reconciled, but it seems to be well recognized that where a remedy exists in state court concerning a matter primarily of state law, the federal courts will hesitate to assume jurisdiction under the principles of comity.

Defiance Water Co. v. *Defiance*, 191 U. S. 184;
Shanks v. *Bunting Mfg. Co.*, 9 F. 2nd 116;
New Orleans v. *Benjamin*, 153 U. S. 411, 424.

It must be remembered that "Education is a field of life reserved to the individual states", in the words of Judge Gibson, below. The Education Law of New York, by Article 125 thereof, established public colleges in the City of New York, the admission to, attendance at, and discharge from

which is regulated by conditions set by the Board of Higher Education—there is, therefore, no grant of federal rights here involved. Consequently, the State judicial machinery is the proper forum unless intentional or purposeful discrimination has been used against petitioner—and that the record clearly shows not to have been the case (see *infra*).

II.

The record does not show any facts which would support petitioner's claim as to deprivation, without due process of law, of his right to freedom of speech and deprivation of the equal protection of the law.

Even if jurisdiction existed in the lower federal Courts, it is respectfully submitted that the petition herein, upon the record, fails to show a deprivation under color of any State law, statute, ordinance, regulation, custom or usage, by the respondents, of any right, privilege or immunity secured to petitioner by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. In order for petitioner to succeed, there must be some showing that there actually was such deprivation. In the petitioner's allegations and the record such showing is noticeably lacking. All that is really evident is that petitioner got into trouble with the school authorities, went too far, was expelled and now regrets it.

There is no showing that the petitioner's constitutional or civil rights were in any way violated by the city or State school authorities acting in this matter, or that he was deprived of, or denied, due process or equal protection of the laws in the proceedings before city and State school officials, including his appeals to the respondent Commis-

sioner of Education. In fact, the record reveals a careful effort on the part of all of said officials to preserve his rights.

It is respectfully submitted that there is no constitutional nor any other federally grounded right of any citizen, much less of a student in a public institution of higher learning who has agreed to abide by the rules and regulations of such institution, to accuse his superiors of "vile indecencies", "blatant injustices", "sham and disgrace", "punitive intimidation", "deliberate and malicious lies", whether or not such accusations are contained in letters addressed to one's superiors or whether they are contained in communications broadcast to large groups of persons.

Nor is there a constitutional right or any other federally grounded right, for a student in such an institution to disregard directives reasonably designed for his own protection and improvement, merely because the student disagrees with such directives.

We are not here dealing with a student who in reasonable terms and respectful language disagrees, however strongly, with certain policies and usages of his college and brings these matters forcefully to the attention of his superiors. To do so, under proper circumstances and in proper language, according to the record herein, was and is considered by the college to be a student's right and a part of the citizenship education process encouraged by the college.

The difficulty with petitioner appears to be, in the words of Judge Gibson of the Court below, that he is too "highly adverbial". The record shows quite clearly that petitioner's behavior over the period of his attendance at the college was improper in a great many respects.

On the procedural side, petitioner was given every opportunity to present his views, to speak in his own behalf and to submit any materials that he wished. It must be remembered that petitioner was only one out of approximately 8000 students at that institution.

The record is replete with instances in which officers and faculty of the college went considerably out of their way to accommodate petitioner and to assist him in overcoming his difficulties.

Petitioner was present and was heard in his own behalf at a hearing held by the Faculty Committee on Orientation and Guidance of Brooklyn College, which said committee unanimously recommended to the Faculty Council that he be dismissed from the college.

Petitioner thereafter, on February 19, 1957, was afforded a hearing before the Board of Higher Education of the City of New York, which upheld the decision of the Faculty Council.

Thereafter petitioner commenced his appeal to respondent Commissioner of Education by the filing of his petition. An answer was filed, a copy of which was served upon him, whereupon petitioner filed a rejoinder together with various supporting documents. On June 13, 1957 petitioner was given an opportunity for oral argument, at which time both he and the Board of Higher Education argued their respective positions. Petitioner was afforded an opportunity to file whatever papers he wished, and was served with a copy of every paper submitted to respondent Commissioner by the Board of Higher Education.

Thereafter respondent Commissioner, after a thorough study of the entire record, dismissed the appeal.

Petitioner thereafter moved to reopen the decision of respondent Commissioner on the grounds that there was available new material evidence not available at the time of the original proceeding and that the decision of respondent Commissioner was rendered under a misapprehension as to the facts. Again, respondent Commissioner carefully studied the entire record and petitioner's moving papers, after which, on October 16, 1957, petitioner's motion to reopen was denied.

The procedure used on appeals to respondent Commissioner under Section 310 of the New York Education Law has been upheld consistently in the Court of Appeals of the State of New York and by this Court (see *Matter of Kubaft*; 52 State Dept. Repts. 59, 246 App. Div. 886, appeal dismissed 271 N. Y. 629, reargument denied 272 N. Y. 508, certiorari denied 300 U. S. 657; rehearing denied 300 U. S. 687; *Matter of O'Brien*, 3 A. D. 2d 321, 3 N. Y. 2d 881, 4 N. Y. 2d 140; motions for leave to appeal denied 6 A. D. 2d 745 and 5 N. Y. 2d 707; motion for reargument denied 6 N. Y. 2d 882; appeal dismissed *sub nomine Murphy* v. *Commissioner of Education*, and certiorari denied 4 L. ed. 2d 154, November 23, 1959).

The Commissioner of Education, in deciding the appeals, followed all constitutional and statutory requirements as well as the requirements of his own rules of practice which he had adopted. Plaintiff was afforded a complete opportunity to file whatever papers he wished. A copy of every paper filed by the Board of Higher Education was also served upon the plaintiff. The parties were afforded full opportunity to argue the matter orally before the Commissioner, and his decision was rendered only after the Commissioner had caused the record before him to be

examined with great care. The judicial proceedings and determination before and by the Commissioner have been held to be constitutional and, further, since the plaintiff elected his remedy, it is impossible for him to show that any right, privilege or immunity guaranteed to him by the Constitution of the United States or an Act of Congress has been denied him. Plaintiff has been granted exactly the same rights and the same privileges and has been treated in exactly the same manner as would any other person who brought an appeal to the Commissioner of Education.

It is, consequently, respectfully submitted that the record herein is barren of any right, privilege or immunity grounded in the Constitution or the Laws of the United States of which he has been deprived.

It is realized, of course, that petitioner never had a full trial. In addition, however, to the cases set forth above, in which the question of the need for a trial on appeals to the Commissioner of Education was decided adversely to a contention therefor, both by the Court of Appeals and by this Court, it must be pointed out that it would be completely impossible for a college with 8000 students to provide a full trial, including hearing stenographer, examination and cross examination of witnesses, for all the disciplinary procedures which obviously become necessary in an institution of such size.

It is pointed out, however, that the record clearly shows that petitioner at all times was given sufficient information to indicate exactly where he had failed to comply with rules, regulations and directives, by numerous letters and numerous personal conferences at which both he and his parents were present, and that he, at all times, was given

a fair opportunity to defend himself, to explain his viewpoints, to correct his mistakes and to be accepted back into good standing in the college.

It is respectfully submitted that all the requirements of due process and of the equal protection of the laws were afforded to petitioner at all times herein.

III.

The questions here sought to be raised are plainly unsubstantial because they are foreclosed by previous decisions of this Court on the subject.

The gravamen of petitioner's grievance is his claim that he was entitled to a full trial before the various educational authorities.

On this point the finding of a substantial federal question is foreclosed by decisions of this Court which have already determined this issue.

Levering & Garrigues Co. v. *Morrin*, 289 U. S. 103;
Water Service Co. v. *Redding*, 304 U. S. 252.

The Court of Appeals of the State of New York has held that no trial is required on appeals to the Commissioner of Education (*O'Brien* v. *Allen*, 4 N. Y. 2d 140). This determination was upheld by this Court, *sub nomine Murphy* v. *Commissioner of Education*, 4 L. ed. 2d 154. This determination is in line with previous decisions of this Court to the same effect:

U. S. v. *Nugent*, 346 U. S. 1;
Anderson Nat. Bank v. *Luckett*, 321 U. S. 233, 246;
Matter of Kabatt, 300 U. S. 657; rehearing denied, 300 U. S. 687.

Since the record shows that petitioner was given every possible chance to understand the nature of his behavior, as viewed by the college authorities, every possible chance to correct his behavior, including a conditional reinstatement, and since the regulations and directives were clear and reasonable in all respects, and since he had every opportunity to be heard, to submit documentary evidence, pleadings, affidavits, statements and briefs, all through these proceedings, it cannot be said that there was present here, any "element of intentional or purposeful discrimination". Thus, petitioner's claim in this respect is foreclosed by *Snowden* v. *Hughes*, 321 U. S. 1, 8, and cases there cited; *Spampinato* v. *M. Breger & Co. Inc. et al.*, 270 F. 2d 46; *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311.

The suspension of a student at the University of Maryland for refusal to obey reasonable regulations of the University was upheld by this Court as not raising any substantial federal question, even though in that case a serious point of conscientious religious conviction was urged on behalf of the student's refusal—which is wholly absent in this case.

Coale v. *Pearson et al.*, 290 U. S. 597.

Similarly, a state statute prohibiting students at the University of Mississippi from belonging to Greek letter societies and fraternities was upheld by this Court against the same claim of violation of the due process of law and of the equal protection of the law clauses of the Fourteenth Amendment.

Waugh v. *Mississippi University*, 237 U. S. 589.

Again this Court upheld the power of the governing body of a public university (California) to require, as a condi-

tion of admission thereto, or retention therein, students to take courses in military training, even against religious and conscientious convictions. Thus, this Court again affirmed the power of a State, through appropriate agencies, to prescribe reasonable regulations for admission to, and retention in, public institutions of higher learning.

Hamilton et al. v. Regents of the University of California et al., 293 U. S. 245.

On the basis of all these decisions, it is respectfully submitted that it is no longer open to argument in this Court, that a State, through appropriate agencies, has the right to enact reasonable regulations relating to the behavior of students in public colleges and universities, and that as long as no purposeful or intentional discrimination is practiced thereunder against individuals, or groups of individuals, no substantial federal question can arise from reasonable disciplinary proceedings in which, as here, all possible procedural safeguards are used, short of a full trial.

IV.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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January 22, 1960.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents New York City Board of Higher Education and Brooklyn College, for their statement in opposition to petitioner's application for a writ of certiorari, respectfully show the following:

1. Statement of Issue

The issue herein is whether the dismissal of petitioner from Brooklyn College and the denial of his appeal by the Commissioner of Education deprived him of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

2. The Facts

In this civil rights case, petitioner, proceeding on a typewritten petition, seeks a writ of certiorari to have this Court review an order of the United States Court of Appeals for the Second Circuit, entered September 21, 1959, which affirmed an order of the United States District Court, Eastern District of New York, granting respondents summary judgment dismissing petitioner's complaint in an action brought under 28 U.S.C.A. 1343 (3).

The affirmance by the United States Court of Appeals is reported in 271 F. 2d 43. Chief Judge Clark dissented from the majority holding. The decision of Judge Rayfiel of the District Court is reported in 161 F. Supp. 549.

Since the present application is presented on typewritten paper, which include numerous exhibits, it is not possible to give folio references. The following facts are undisputed.

(1)

Petitioner was suspended as a student of Brooklyn College effective March 3, 1955, for the remainder of the Spring 1955 term after the College President had received letters admittedly written by petitioner accusing the President, college officers, administrators and teachers of vile indecencies, blatant injustices, punitive intimidation and sham and disgraceful actions and with engaging in unscrupulous and high-handed tactics.

In September, 1955, petitioner requested permission to resume his college studies and stated that he fully realized where the authority and legal responsibility rested at Brooklyn College. He admitted his mistakes in resorting to undignified expressions and promised to abide by the regulations of the college and to conform to the manners and morals prescribed for proper student conduct. On this basis petitioner was permitted to register as a student.

Thereafter, Herbert Stroup, Dean of Students, found it necessary to admonish petitioner that "continued infraction of your agreement can only lead to serious disciplinary action by the college." For the Fall 1956 term petitioner was prohibited from holding officerships or memberships in any student organizations.

Petitioner admitted writing the following statement which appeared in the "Kingsman", a Brooklyn College student publication, on September 20, 1956:

> "Dean Stroup's most recent abuse of his disciplinary powers is indicative of the discriminatory and vindictive policies which have become typical of the administration of Brooklyn College. The failure to state specific reasons which might justify such prohibitions of my extra curricular activities and the Dean's refusal to grant me a hearing before the Faculty Committee on Orientation and Guidance or a student committee of the Executive Council proves his avowed disrespect for the principles of due process and academic freedom. I intend to appeal this decision to President Gideonse in the hope that it might prove beneficial in easing the strained faculty student relations which have existed for so long at B. C."

On September 21, 1956, Dean Stroup wrote petitioner as follows:

> "In accordance with repeated oral and written warnings in the past by me and several other college officials, and because of your continued disregard for the rules and regulations of Brooklyn College, your continued indulgences in untruthful statements about college officers and the college and your patent unwillingness to heed the injunctions of the college authorities, I am hereby suspending you beginning with the class sessions on Monday, September 24, 1956, for the remainder of the term.
>
> "Contrary to your public assertion and in keeping with actions which you have taken in the past, I

am hereby informing you that you now have appeal recourse to the President of the College."

Additional correspondence was exchanged between Dean Stroup, President Gideonse, the petitioner and his parents. Petitioner, during the course of this second suspension, appeared on the campus, distributed correspondence and leaflets and endeavored to attend meetings of the Executive Council.

On December 10, 1956, petitioner applied for reinstatement. He was interviewed by the Faculty Committee on Orientation and Guidance. Upon the unanimous recommendation of the committee, the Faculty Council by majority vote recommended that petitioner be dismissed from Brooklyn College. In advising petitioner of the Council's action, President Gideonse wrote in part as follows:

> "A careful study of your record before and after your first and during your second suspension indicates continuous and repeated disrespect for college rules and a deliberate intention not to change your conduct after repeated warnings and counseling. I do not need to remind you at this stage that every student admitted to Brooklyn College signs a pledge to observe college regulations, and that the by-laws of the Board of Higher Education provide that students shall obey all the rules and regulations of duly established college authorities, that they shall give punctual and courteous attention to all college duties, and that they shall conform to the requirements of good manners. The charges in your case indicate a disregard of clear and repeated instructions regarding your presence and conduct on the campus during the period of your suspension, the use of abusive language in letters addressed to college officers, and evidence of deliberate intention to continue such conduct."

Petitioner appealed to the Board of Higher Education. After a hearing the appeal was dismissed. Petitioner

sought to review the Board's action in an appeal to the Commissioner of Education. After examining the record, and conducting a hearing, the Commissioner decided (78 [N. Y.] State Dept. Rep. 65) that there was no basis for interfering with the action of the Board and dismissed the appeal. In a decision reported in 78 [N. Y.] State Dept. Reports 85, the Commissioner disallowed petitioner's application for reargument.

(2)

The petitioner thereupon instituted an action in the United States District Court for the Eastern District of New York by the service of a complaint in which he demanded "immediate reinstatement as a student at Brooklyn College, or an order remanding the case to the Faculty Council of Brooklyn College for a new judgment based upon a trial incorporating adequate procedural safeguards."

In his complaint petitioner alleged that he was maliciously suspended by Dean Stroup, which suspension was arbitrarily sustained by President Gideonse; that subsequently he was unlawfully dismissed by the Brooklyn College Faculty Council; that the Board of Higher Education illegally denied his request for a fair hearing upon his trial; and that the Commissioner acted unconstitutionally in refusing to reverse the Board's action. Petitioner asserted that such action by state and municipal authorities violated those provisions of the Fourteenth Amendment which guard against deprivation of liberty without due process and the denial of equal protection of the laws. His complaint also charged deprivation of liberty and abridgement of freedom of speech through statements made in a report of the Faculty Committee and in the allegedly "invalid application of the Board's by-laws, as well as in various statements attributed to faculty members."

Petitioner claimed further that he was denied due process when suspended and dismissed without receiving a full and specific bill of particulars; when not informed of written and specific charges prior to his meeting with the Faculty Committee; that his presentation and rebuttal before both the Board of Higher Education and the Commissioner of Education were thereby rendered deficient; that the lack of cross-examination prevented him from establishing bias and malice; that the time limits prescribed for presentation of arguments before the Board of Higher Education and the Commissioner of Education were unreasonable and insufficient; that the Faculty Committee demonstrated a lack of good faith and partiality and due process, and finally, that review by the Board of Higher Education lacked both due process and reciprocity. Petitioner stated that he was denied equal protection of the laws because other students made public statements derogatory of Brooklyn College practices and have gone unpunished. He concluded that students of public institutions are entitled to the equal protection of the laws insofar as the freedoms of the First Amendment are concerned.

The Board of Higher Education served and filed an answer to the complaint and pleaded a general denial and asserted three separate and complete defenses, namely, failure to state a claim, full compliance with the applicable regulations and statutes, and *res judicata*.

The Commissioner of Education moved to dismiss the complaint for lack of jurisdiction over the subject matter on the following grounds: failure to state a cause of action under subdivision 3, Section 1343, Title 28 of the United States Code; failure to state a constitutional question; failure to show any violation by the Commissioner of the provisions of the Fourteenth Amendment; and full compliance with the applicable regulations and statutes.

The Board of Higher Education joined in the Commissioner's motion to dismiss and urged as grounds therefor the following: failure to state a claim upon which relief could be granted; *res judicata* by reason of a prior decision of the Commissioner; and failure to show deprivation of any right, privilege or immunity guaranteed by the Federal Constitution.

(3)

In an exhaustive opinion, reported in 161 F. Supp. 549, which considered defendants' motions to dismiss as motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, the District Court dismissed the complaint. In doing so, Judge Rayfiel reviewed the entire record including the correspondence between the petitioner and the officials of Brooklyn College and all the papers submitted to the Commissioner. Judge Rayfiel found that the Board of Higher Education not only had the power to prescribe conditions of students' admission, attendance and discharge, but also that the Board had prescribed that each student shall obey all the rules, regulations and orders of the duly established college authorities and shall conform to the requirements of good manners. The Judge also found that Dean Stroup was authorized to suspend a student for a period not to exceed one term and that he could recommend dismissal which might be imposed by the College President or by a majority vote of the Faculty Council.

The District Court also considered those provisions of the Education Law (Section 310) which relate to appeals to the Commissioner of Education and held that the practice on appeals to the Commissioner has been sustained as constitutional. In dismissing the complaint, the Court also noted that petitioner had failed to exhaust all the legal remedies available to him by statutory provision in the courts of New York State.

The United States Court of Appeals, Second Circuit, in a decision reported in 271 F. 2d 13, Chief Judge Clark dissenting, affirmed the decision of the District Court.

The majority of the Court of Appeals, Judges Gibson and Moore, though disagreeing as to jurisdiction, were in complete accord that petitioner had failed to present any question warranting the interference of a federal court. Judge Gibson predicated his holding principally on the ground that education is a state function, subject to restriction by the Federal Government where discrimination against an individual because of race, color or creed occurs. Judge Moore based his ruling principally on petitioner's failure to make out a case on the law or the facts and the absence of a material issue of fact which required a trial.

In his dissenting opinion, Chief Judge Clark accepted as factual allegations petitioner's conclusory descriptions and characterizations of administrative actions at Brooklyn College, before the Board of Higher Education and before the Commissioner of Education. He reached the conclusion that petitioner is now barred from further public education in the State of New York and is therefore entitled to invoke the aid of the federal courts.

Chief Judge Clark relied chiefly on *Brown* v. *Board of Education of Topeka*, 347 U. S. 483 (1954), *Borders* v. *Rippy*, 247 F. 2d 268 (5th Circ., 1957), and *Romero* v. *Weakley*, 226 F. 2d 399 (9th Circ., 1955). However, these cases all involved racial segregation and are clearly distinguishable from the instant proceeding.

ARGUMENT

The petition fails to present any substantial questions for review by this Court.

(1)

Petitioner in his complaint asserts jurisdiction in the District Court under 28 U.S.C.A. 1343 (3), which provides as follows:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * *
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; * * *."

He alleges that he has a just grievance under the Fourteenth Amendment of the United States Constitution, in that the state and municipal authorities have violated those provisions which read:

> "No state shall * * * deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Initially, we would point out that petitioner's right to attend Brooklyn College is not secured by the Constitution of the United States or by any Act of Congress but is predicated rather on reasonable conditions lawfully imposed by the college authorities pursuant to the authorizations found in the New York State Education Law and in the by-laws of the Board of Higher Education. Among the latter is the specific provision that each student shall obey all rules, regulations and orders of the duly estab-

lished college authorities and shall conform to the requirements of good manners and good morals.

Any doubt as to petitioner's awareness of these provisions prior to the incidents leading up to his initial suspension is clearly non-existent insofar as incidents subsequent to his reinstatement are concerned. Before his reinstatement petitioner stated that he fully realized where the authority and legal responsibility lie at Brooklyn College. In his petition for certiorari, he asserts for the first time in these proceedings that the "good manners" requirement is vague.

Shortly after his reinstatement, and in spite of his admitted realization as aforesaid, petitioner continued to disregard the rules and regulations of the college, refused to obey the orders of the college authorities, and resorted to abusive, intemperate, vituperative and indiscreet language in referring to the administration of Brooklyn College. Upon evidence of a deliberate intention on his part to continue such conduct the petitioner, after a hearing, was dismissed in accordance with the applicable procedural regulations.

It is not now open to question that petitioner conducted himself as described above. Petitioner has never denied this conduct. Indeed, the voluminous exhibits annexed to the motion papers filed in behalf of the Commissioner of Education in the District Court established conclusively that the pattern of conduct which petitioner, over his signature, set as acceptable for himself did not conform to the collegiate requirements of good manners and obedience to the rules and regulations of the college.

The petitioner herein demands a free college education from the municipal authorities and at the same time insists that he shall be exempt from the reasonable conditions lawfully imposed by the college administrators to regulate the admission, attendance and discharge of students in the municipal college.

In *Hamilton, et al. v. Regents of the University of California, et al.*, 293 U. S. 245 (1934), a case analogous to the one at bar, this Court said (p. 262):

> "Taken on the basis of the facts alleged in the petition, appellant's contentions amount to no more than assertion that the due process clause of the Fourteenth Amendment as a safeguard of 'liberty' confers the right to be students in the state university free from obligations to take military training as one of the conditions of attendance.
>
> "Viewed in the light of our decisions that proposition must at once be put aside as untenable."

It is well settled that the due process clause of the Fourteenth Amendment was not designed to interfere with the power of a state to prescribe reasonable regulations to promote health, peace, morals, education and the good order of the people, *Thompson v. Wallin*, 276 App. Div. 463 (3rd Dept., 1950), aff'd 301 N. Y. 476 (1950), cert. denied 342 U. S. 801 (1951). Nor has the due process clause been interpreted to require in administrative hearings or appeals all those safeguards which are requisite to a judicial trial, *United States v. Nugent*, 346 U. S. 1 (1953); *Anderson National Bank v. Luckett*, 321 U. S. 233 (1944).

(2)

The New York State Education Law § 310 provides for appeals to the Commissioner of Education. The petitioner herein appealed to the Commissioner after he had been denied relief by the Board of Higher Education. The constitutionality of the Commissioner's appellate jurisdiction and the procedure involved in such appeals has long been recognized, *Bullock v. Cooley*, 225 N. Y. 566 (1919).

At every step in the proceedings, the administrative agencies complied with their bylaws, rules and regulations and all applicable statutory provisions. Nowhere was peti-

tioner treated arbitrarily or unfairly. At every hearing he was informed of the nature of the charges made against him and was afforded an opportunity to file papers and to argue orally in opposition. There is no denying that before the Commissioner both the petitioner and the Board received equal treatment.

When the Board of Higher Education rejected his appeal petitioner could have (1) appealed to the Commissioner of Education, (2) pursued his remedy in the New York State Courts pursuant to Article 78 of the Civil Practice Act, or (3) turned to the Federal Courts under 28 U.S.C.A. 1343 (3). Petitioner appealed to the Commissioner of Education and thus effected a complete election of remedies, *Levitch* v. *Board of Education*, 243 N. Y. 373 (1926).

Following the denial of his appeal by the Commissioner of Education, petitioner could still have applied to the New York State Supreme Court for review under Article 78 of the Civil Practice Act, *Ross* v. *Wilson*, 308 N. Y. 605 (1955). However, petitioner abandoned this remedy and sought relief in the federal courts. Petitioner has, we submit, foreclosed federal court review of the Commissioner's decisions by failing to proceed in the courts of New York State.

(3)

It is apparent from the complaint that petitioner does not challenge the validity of the rules, regulations, bylaws and statutes under which he was expelled and under which his several appeals were heard and rejected but does challenge the manner in which such rules and regulations were applied in his case. For example, the complaint alleges that the actions of the state and municipal officers were malicious, arbitrary, unlawful, illegal and resulted in an invalid application of the bylaws. However, the complaint does not allege any facts tending to show an intentional discrimination against petitioner personally or as a mem-

ber of a class. Accordingly, quite apart from the conclusory character of the allegations in the complaint, the petitioner has clearly failed to state a substantial question involving the Federal Constitution.

This Court in passing upon a similar problem in *Snowden v. Hughes*, 321 U. S. 1 (1943), involving the right of a citizen to be a candidate for and to be elected to State office said (p. 7):

> "There is no contention that the statutes of the state are in any respect inconsistent with the guarantees of the Fourteenth Amendment. There is no allegation of any facts tending to show that in refusing to certify petitioner as a nominee, the Board was making any intentional or purposeful discrimination between persons or classes."

The Court continued as follows (p. 10):

> "The lack of any allegations in the complaint here, tending to show a purposeful discrimination between persons or classes of persons is not supplied by the approbious epithets 'wilful' and 'malicious' applied to the Board's failure to certify petitioner as a successful candidate, or by characterizing that failure as an unequal, unjust and oppressive administration of the laws of Illinois. These epithets disclose nothing as to the purpose or consequence of the failure to certify, other than that petitioner has been deprived of the nomination and election, and therefore add nothing to the bare fact of an intentional deprivation of petitioner's right to be certified to a nomination to which no other has been certified. Cf. *United States v. Illinois Central R. R. Co.*, 303 U. S. 239, 243."

The Court stated further (p. 11):

> "If the action of the Board is official action, it is subject to constitutional infirmity, to the same but no greater extent than if the action were taken by the state legislature. Its illegality under the state

statute can neither add to nor subtract from its constitutional validity. Mere violation of a state statute does not infringe the federal constitution."

The Court concluded (pp. 11-12):

> "It was not intended by the Fourteenth Amendment and the Civil Rights Acts that all matters formerly within the exclusive cognizance of the states should become matters of national concern.
>
> A construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored."

Petitioner has failed to present for review by this Court any substantial constitutional question.

CONCLUSION

The petition for a writ of certiorari should be denied.

January 22, 1960.

Respectfully submitted,

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